IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

FRIDAY, THE 5TH OCTOBER 2007 / 13TH ASWINA 1929

CRL.A.No. 1797 of 2007()

ST.223/1998 of JUDL.MAGISTRATE OF FIRST CLASS-I, KOTTARAKKARA

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APPELLANT: COMPLAINANT

FOOD INSPECTOR, KOTTARAKARA CIRCLE,

BY PUBLIC PROSECUTOR SRI.PUZHAKKARA MOHAMMED

RESPONDENTS: ACCUSED

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1. V.SOMARAJAN, KOCHUVADAKKATHIL VEEDU, CHAKKUVARAKKAL, KOTTARAKKARA.

2. S.BABU, KAVUVILA VEEDU, KUTTIKONAM, KUNNIKODE, PATHANAPURAM TALUK.

R2- BY ADV. SRI.NIDHI BALACHANDRAN

R1-BY ADV.SRI.PRATHEESH.P

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 05/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

CRL.AL.NO.1797 OF 2007-D

Dated this the 5th day of October, 2007.

JUDGMENT

This is an appeal filed by the State against the acquittal order passed in ST.No.223/1998. The appeal has been filed along with the petition for condonatin of delay. The delay petition was considered by this Court on hearing the counsel on either side.

2. Today , this appeal has come up for admission. This Court heard the learned Public Prosecutor for the appellant Food Inspector and also the counsel appearing for the respondents. The order impugned is seen passed under Section 256(1) of the Code by which the respondents/accused were acquitted by the trial court. The only reason stated in the order impugned for the acquittal was non-appearance of the complainant- the Food Inspector. The trial court had not considered the position that the complainant was a public servant and only on the absence of the complainant on one day by itself, may not be a reason for acquitting the accused without giving a further time to the public servant to prosecute the respondents for and on behalf of the State. In the above

circumstances, the trial court had not complied with the principles laid down by this Court. In the judgments reported in **Don Bosco v. Partech Computers Ltd.** (2005 (2) KLT 1003) and **G.F.S. Chit & Loans (P) Ltd. v. Rajesh** (2006 (3) KLT 825), this Court had categorically held that de-merited disposal of a criminal case will affect dispensation of the criminal case and the court shall not acquit the accused under Section 256(1) without applying its judicial mind. The Apex Court also had reported in **Associated Cement Co.Ltd. v. Keshvanand** (1998 (1) KLT 179 (SC) as follows:

> 17. Reading the section in its entirely would reveal that two constraints are imposed on the court for exercising the power under the Section. First is, if the court thinks that in a situation it is proper to adjourn the hearing then the magistrate shall not acquit the accused. Second is, when the magistrate considers that personal attendance of the complainant is not necessary on that day the magistrate has the power to dispense with his attendance and proceed with the case. When the court notices that the complainant is absent on a particular day, the court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing

> down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must, therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice."

3. Applying the principles pronounced by this Court and the Apex Court, the judgment under appeal has to be set aside. Accordingly, the judgment under challenge is set aside and the matter is remanded back to the trial court for a fresh disposal as per law. The parties shall appear before the lower court on 17.11.2007 without fail.

The appeal is allowed by way of remand.

K. THANKAPPAN, JUDGE.

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